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IN THE

Supreme Court of the United States

October Term, 2001

Susan Tave Zelman,
Superintendent of Public Instruction of Ohio, et al.,
Petitioners

v.

Doris Simmons-Harris, et al.,
Respondents

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

BRIEF OF AMICI CURIAE JOHN E. COONS AND STEPHEN D. SUGARMAN

In Support of Petitioners

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INTEREST OF *AMICI CURIAE*

John E. Coons is the Robert L. Bridges Professor of Law Emeritus and Stephen D. Sugarman is the Agnes Roddy Robb Professor of Law at the University of California at Berkeley (Boalt Hall). As elaborated below, for more than thirty years *amici* have collaborated to advance the understanding of the legal and policy aspects of "school choice" through research and publication and through the design of alternative legislative models.

This brief is filed with the permission of counsel for both petitioners and respondents and is in support of petitioners.

ABBREVIATED SUMMARY OF THE CASE

Ohio's Pilot Project Scholarship Program is part of a diverse nationwide "school choice" movement. Along with other school choice reforms in Cleveland and elsewhere in Ohio, the Program extends new educational opportunities within both the public and private sectors to Cleveland families who previously have had little choice but to enroll their children in their assigned local public school.

SUMMARY OF THE ARGUMENT

The Ohio legislature has not endorsed religion. It has endorsed equal educational opportunity for disadvantaged Cleveland children.

Many state legislatures are responding in an experimental spirit to the problems of American elementary and secondary education. One strategy is "school choice" facilitated through public charter schools, new inter-district transfer policies, public magnet schools, and increased ac-

cess to private schools through scholarships and vouchers. Relying upon the advice of educators and social scientists, some states have included the choice of religious private schools as a part of these multi-faceted experiments. Research has shown that religious schools are especially successful at educating low-income children. All this legislative experimentation represents federalism at its best.

In America, the family's choice of its child's school traditionally has been exercised either by securing residence in the attendance zone of the public school preferred by the family or by paying tuition to a private school. As a result, the school that any particular child attends often is determined by the wealth of his or her parents. Seeing this as unfair and unwise, reforming legislators in several states have begun to provide greater choice in both public and private sectors to those families who lack it. It was to this end that Ohio created the program of expanded choice now under review.

The Ohio program was specifically tailored to empower low-income and working class parents by furnishing them some measure of the financial autonomy that has served middle class and well-to-do families. The scholarships under attack are redeemable in those schools public and private — religious or non-religious — that decide to participate in the plan. The plan is indifferent to the family's preference among qualified schools; it neither endorses nor discredits a choice because it is, or is not, religious. Hence the Ohio program does not offend the First Amendment under any fair reading of the relevant precedents of this Court.

ARGUMENT

I. History and Context

Amici first proposed "school choice" in 1970, as a legislative remedy for families whose children were stuck in the schools of "low wealth" and "low spending" public

school districts.[1] During the 1970s we noticed the importance of "school choice" in the writings of Thomas Paine, Adam Smith and John Stuart Mill, and included this historical perspective in a book presenting the case for empowering families through "school choice.[2] Over the years, we have promoted "school choice" as a supplemental remedy in school desegregation cases, for example, in Los Angeles in 1977[3] and in Kansas City in 1989.[4]

Throughout these more than three decades, our main theme has been that — even given preferential levels of public expenditure — children of working class and poor families do not enjoy the same educational opportunities as those who are financially better off. For the latter, school choice has long been available and widely exercised. Financially able families either move their residence to a community whose public schools they find appropriate for their children or pay to send their children to private schools. As a practical matter, working class and low-income families have neither of these choices. Instead, their children are typically assigned to the local public school.

At one time it was widely believed that any American child could obtain a good education at any American public school. Given that perception, unequal access to the cherished liberty to choose was not so widely seen as unfair and oppressive. But with the publication of *A Nation At Risk* in 1983, things changed dramatically. That report, from a blue ribbon panel appointed by President Reagan, sounded the alarm that America's public schools are failing to educate too large a share of our nation's youth. In the intervening years, it has become abundantly clear that these shortcom-

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[1] John E. Coons, William H. Clune III, and Stephen D. Sugarman, *Private Wealth and Public Education* 256-68 (Harvard University Press, 1970).

[2] John E. Coons and Stephen D. Sugarman, *Education by Choice: The Case for Family Control* (University of California Press, 1978).

[3] Our *amicus* brief is reprinted in *Parents, Teachers & Children: Prospects for Choice in American Education* 301 (Institute for Contemporary Studies, 1977).

[4] Stephen D. Sugarman, "Using Private Schools to Promote Public Values" 1991 *University of Chicago Legal Forum* 171.

ings are especially acute in large urban public school districts and certain rural districts. Schools in both types of districts often are charged with the duty of educating a disproportionate number of children from low-income families.

In response to *A Nation at Risk*, several nationwide movements have developed, all seeking to improve the education of America's children. These movements include (a) the "standards" movement that generally seeks to hold schools and pupils accountable through "high stakes" testing, (b) the "whole school reform" movement, that seeks to transform the way that schools deliver education to children, and (c) the "school choice" movement.

The "school choice" movement aims simultaneously to give many more families opportunities to decide where their children receive instruction, and — by the challenge of a controlled market — to bring about a general improvement of education. Put broadly, the goals are, first, that many more children will actually obtain what their families consider to be good education; and, second, that in response to the concern that some newly empowered families will prefer alternate schools, public schools of low quality will start to reform themselves, sometimes by copying innovative ideas developed in the private sector.

The Cleveland plan is broader than the "voucher" mechanism at issue here. Indeed, Ohio reforms illustrate various significant parts of the school choice movement, serving to emphasize the diversity of the experiments now under way in American states. These include:[5]

(a) charter schools (which are autonomous public schools, attended by choice) — more than 2000 of which have been created in more than 30 states in the past few years,

(b) inter-district school transfer programs — which have been adopted in at least 18 states,

[5] Jeffrey R. Henig and Stephen D. Sugarman "The Nature and Extent of School Choice" in *School Choice and Social Controversy: Politics, Policy, and Law* (S. D. Sugarman and F. R. Kemerer, eds., Brookings Institution Press, 2000).

(c) an increased number of "magnet, alternative, and specialty" public schools that draw pupils by parental choice,

(d) more than 100 privately-funded private school voucher programs currently in place in cities around the country,

(e) "controlled choice" plans — adopted in a variety of public school districts — where every family selects a school and no child is simply assigned by residence, and

(f) as part of this wider "school choice" movement, the publicly funded Cleveland program before this Court, which, like the Milwaukee program on which it was based, expands the options of parents who are mostly poor and mostly minority by including private schools.[6]

As legislatively designed, the plan gives Cleveland families a choice among (i) their assigned local public school, with the child's education enhanced through a subsidy for special tutoring, (ii) participating Cleveland private schools, and (iii) suburban public schools. So far the suburbs have declined to participate, frustrating the opportunity for racial integration through choice that Ohio sought to provide to eligible inner city children who are primarily African-American. Nonetheless, a substantial expansion of choice has been effected, and individual suburban districts may yet decide to welcome Cleveland children as private schools have.

We know from research findings reported from several communities that participating low income parents endorse expanded choice. Families who opt for different schools

[6] For further discussions of these sorts of programs, as well as other choice plans aimed at the neediest of our children, see John E. Coons and Stephen D. Sugarman, *Scholarships for Children* (Berkeley Institute of Governmental Studies Press, 1992) and John E. Coons and Stephen D. Sugarman, *Making School Choice Work for All Families: A Template for Legislative and Policy Reform* (Pacific Research Institute, 1999).

generally report that the new schools care more about their children, that those schools seem safer, and that their children attend more regularly. Scholarly research has detected significant academic gains in some places, but it is too early in the experiment to tell whether children sent to schools of choice pursuant to this sort of program will enjoy sustained learning gains across the years. Early concerns raised by some people that this sort of program would skim off the "best" students appear to be unwarranted. What is clear is that inclusion of private school choice assures more families the type of teaching program and educational values they want for their children – an extension of the equal liberty principle so fundamental among our nation's values.

It has been objected that a high proportion of the parents in the Cleveland and Milwaukee programs are choosing religious schools. This is hardly surprising since most private schools in the U.S. were formed as religious schools, and it will take time for new private schools to be launched. Moreover, under the rules now governing the Cleveland schools, typically it is financially advantageous for private non-religious schools to form a new public charter school rather than a new private school funded by the Pilot Project Scholarship Program. This is an important point. These new public charter schools should be understood to be among the range of options being offered to Cleveland families by the diverse package of Ohio legislation that the "school choice" movement has generated.

We assume that for some Cleveland families who have selected a denominational school, the religious aspect is important, just as it has been for many of the families who have made that choice in the past. Many other Cleveland families, however, are clearly choosing religious schools today for the conventional secular educational benefits they provide. This is evident, for example, in the decision of many African-American Protestant families to send their children to schools run by Catholic parishes and orders. Still other scholarship-eligible Cleveland families are choosing to stay in the local public schools, perhaps persuaded by the promised extra tutoring. Obviously their choices are also

germane in assessing the "purpose and effect" of this experiment.

II. Applying the Establishment Clause in Light of the History and Context of the Contemporary School Choice Movement

As a matter of constitutional law, the basic point is this: Viewed as public policy, programs like the Cleveland plan are not centrally, or even importantly, about religion. Rather, they are about giving more educational opportunities to "have-nots." This is the conclusion to be drawn whether one applies the "neutrality" test, the "endorsement" test, or the "purpose and effect" test (as it has evolved in recent decisions of this Court).

We will put it more bluntly. In the late 1960s and early 1970s, state "aid to private school" statutes could be fairly characterized in the following way: The Catholic schools, which then (but not today) educated the lion's share of private school children, were understood to be in danger of closing in many communities. If Catholic schools were to close, the cost of providing schooling for their pupils would fall upon the public schools. So, it was hoped that, with a modest amount of financial support, they would remain open. But those programs, struck down by the Court in cases like *Lemon*[7] and *Nyquist*[8], never concerned themselves with the possibility that many more disadvantaged families would be enabled thereby to exercise choice; nor were they aimed at stimulating improvements in the public schools. We put aside the question whether those plans would be held unconstitutional today by this Court.

What we want to re-emphasize is that the history and context of programs like the Cleveland plan are altogether different. These plans are about giving choice to many more families. They are about improving our urban public schools, and they are about generating innovative educa-

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[7] *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

[8] *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973).

tional reforms through a diverse market. As described above, they are embedded in a much wider nest of related reforms that are structured to promote family choice in education in many ways. Together these plans constitute a crucial policy experiment in the reform of education; only in the most incidental way have they any connection with religion.

We recognize that not everyone believes that "school choice" is the best way — or even a good way — to improve education. We appreciate that the various parts of the "school choice" movement have so-far received differing receptions among the states. What must be hoped from the Cleveland case is that decisions about school choice will continue to be made through normal political processes, and not be pre-empted by a decision of this Court. Other parts of the "school choice" movement could in theory move ahead without plans like Cleveland's. But as observers on the ground, we are well aware of political realities, and if publicly funded "private choice" plans like Cleveland's are precluded, "public choice" plans like charter schools, inter-district transfers, and the like will be put at risk.

Like many others, we have realized for some time that an Establishment Clause challenge to the goal of giving expanded school choice to disadvantaged families would at some time come before this Court.[9] It is fortunate that the Cleveland program emerges from a setting in which is transparent that neither the objective of the plan, nor its substantial effect, is religious. The Ohio legislature has not endorsed religion. It has endorsed equal educational opportunity for disadvantaged Cleveland children.

Respectfully submitted,

John E. Coons *

[9] Stephen D. Sugarman, "Family Choice: The Next Step in the Quest for Equal Educational Opportunity?," 1974 *Law and Contemporary Problems* 513.

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